No. 90-1088

In The

Supreme Court of the United States

October Term, 1990

THOMAS CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone,

Petitioner,

vs.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATRES, INC., a New York Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Federal Cigarette Labeling and Advertising Act, which requires warning labels on cigarette packages and advertisements, preempts state tort claims premised on the adequacy of the health warnings or the propriety of the cigarette manufacturers' advertising practices.

2. Whether the Federal Cigarette Labeling and Advertising Act preempts state intentional tort claims premised on the cigarette manufacturers' suppression of cigarette-related health information and their intentional deception of consumers regarding the nature and extent of the health hazards of smoking.

PARTIES

The parties appearing in the United States Court of Appeals for the Third Circuit were Antonio Cipollone, individually and as executor of the estate of Rose D. Cipollone, appellee below, and three cigarette manufacturers: Liggett Group, Inc., Philip Morris, Inc., and Loew's Theatres, Inc., appellants below.

The petitioner for this writ of certiorari is Thomas Cipollone (the alternate executor of the estate of Rose D. Cipollone and the individual to be substituted as executor for the estate of Antonio Cipollone). The respondents are Liggett Group, Inc., Philip Morris, Inc. and Loew's Theatres, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 893 F.2d 541 (3d Cir. 1990) (1a). A prior opinion of the Third Circuit in this case, which decided the question of preemption on a certified interlocutory appeal, is reported at 789

F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987) (95a). The District Court's original opinion is reported at 593 F. Supp. 1146 (D.N.J. 1984) (109a).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit denied petitioner's timely petition for rehearing *en banc* on August 30, 1990. Petitioner seeks review of this judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

On November 21, 1990 this Court granted petitioner a thirty-day extension to file this petition until December 28, 1990 (163a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case requires the Court to analyze the preemptive scope of the Federal Cigarette Labeling and Advertising Act (hereafter the "Act" or "Cigarette Act"), 15 U.S.C. § 1331, *et seq.*

Effective January 1, 1966, Section 1333 of the Act required cigarette manufacturers to alert consumers: "Caution: Cigarette Smoking May be Hazardous to Your Health." In 1970, Congress determined that the 1966 warning was inadequate.[1] It amended

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1. The Federal Trade Commission's first report to Congress in 1967 on the effectiveness of the federally-mandated health warning concluded that:

> [I]f the public is to be effectively warned of the health hazards of cigarette smoking, the Commission is convinced that the present cautionary statement on cigarette packages is not sufficient to accomplish the result.

FTC Report to Congress, Pursuant to Federal Cigarette Labeling and Advertising (Cont'd)

the Act to require: "Warning: The Surgeon General Has Determined that Smoking is Dangerous to Your Health." In 1985, the Act was again amended to include four more specific and graphic health warnings on a rotating basis.

Section 1331 of the Act contains the following statement of policy and purpose:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette

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(Cont'd)
Act, at 7 (June 30, 1967). The report further concluded that:

> the warning label on cigarette packages has not succeeded in overcoming the prevalent attitude toward cigarette smoking created and maintained by the cigarette companies through their advertisements, particularly the barrage of commercials on television, which portray smoking as a harmless and enjoyable social activity that is not habit forming and involves no hazards to health.

Id. at 28.

> labeling and advertising regulations with respect to any relationship between smoking and health.

Congress included within the Act a provision regarding preemption, and it is this provision which is now before this Court for interpretation and application. Congress stated:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334.

Petitioner concedes that this section prohibits states from regulating cigarette packaging, and cigarette advertising by, for example, requiring a warning other than that set forth in the Act. Petitioner argues, however, that this provision does not preempt state common law tort claims such as those asserted by petitioner.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

This diversity action was brought in the District Court for the District of New Jersey under 28 U.S.C. § 1332(a)(1). The petitioner resided in New Jersey; each of the respondent manufacturers has its principal place of business in a state other than New Jersey; the amount in controversy exceeds $50,000, excluding interest and costs.

B. Petitioner's Background and Factual Allegations

Rose Cipollone smoked respondents' cigarettes from 1942 until 1982, when her lung was removed.[2] Mrs. Cipollone died on October 21, 1984 from the metastasis of her smoking-induced lung cancer. At her death, her husband Antonio Cipollone continued the lawsuit. Mr. Cipollone died in January 1990; Mr. and Mrs. Cipollone's son, Thomas, now maintains the suit.

In 1983, Mrs. Cipollone brought this products liability action against Liggett Group Inc., Philip Morris, Inc., and Loew's Theatres, Inc. (Lorillard, Inc.), the companies that manufactured the cigarettes she smoked.

The complaint alleged that the cigarette manufacturers failed to adequately warn Mrs. Cipollone of the health consequences of smoking. Rose Cipollone did not know about the dangers of cigarette use when she began smoking in 1942. Evidence adduced at trial, however, indicates that respondents were or should have been well aware by 1942 that smoking posed a serious health risk to smokers. The 1966 congressionally-mandated warning eventually placed on cigarette packages that smoking "may be hazardous to your health," did not adequately convey the nature or extent of the health risks of smoking. Moreover, respondents' public relations and promotional efforts were designed to undermine the effectiveness of the warning by disputing all health claims so as to convince the public that a controversy existed with no established scientific proof of cancer causation. In this regard, the complaint also alleged that respondents' promotion of their products intentionally subverted or at least neutralized the effectiveness

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2. The facts contained in this section primarily derive from the trial court's findings of fact in *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487 (D.N.J. 1988).

of the health warnings required by the Cigarette Act.[3]

Mrs. Cipollone testified that respondents' advertising directly influenced her to begin smoking and later to switch to low tar cigarettes that respondents had led her to believe were "milder" and "safe."[4] Mrs. Cipollone believed the press releases and promotional materials issued by the tobacco companies and their trade association, which denied any causal "link" between smoking and lung cancer. Mrs. Cipollone credited news articles, some directly attributable to cigarette manufacturers and some which, unbeknownst to her, were ghost-written by employees of the cigarette companies claiming for example, that the cigarette-cancer link was "bunk."[5]

C. Procedural History

In 1984, the District Court held that the Cigarette Act does

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3. *See supra*, note 1.

4. The Federal Trade Commission Report to Congress in 1967 also concluded that

> [M]any smokers would like to give up the habit, but don't and won't. Some of them have switched to brands that they believe, often erroneously, to be less hazardous. . . . [M]illions of smokers will continue to be deceived by false claims of "mildness" and misleading portrayals of filters.

FTC Report to Congress, Pursuant to Federal Cigarette Labeling and Advertising Act, at 28 (June 30, 1967).

5. *See, e.g.*, headline story in the National Enquirer, "Cigaret Cancer Link is Bunk," (Mar. 3, 1968) (227a) written by an employee of the cigarette manufacturers' public relations firm. The story acknowledges no connection between the industry and the author. Because of the Third Circuit's preemption decision, the jury was not permitted to hear any evidence at trial about the cigarette companies' role in the authorship of this and similar articles.

not preempt petitioner's state based tort claims. 593 F. Supp. at 1146, 1171 (162a). The Third Circuit, however, on interlocutory appeal issued a brief but sweeping opinion reversing the trial court's decision on federal preemption. It held:

> the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes.

The Circuit Court stated that while the Cigarette Act did not expressly or even impliedly preempt state tort claims, such claims were preempted by the Act under the "actual conflict" prong of the preemption doctrine. 789 F.2d at 186-87 (104a-105a).[6]

In so holding, the Third Circuit did not discuss any of the Act's legislative history, *id.* at 186 (103a), which reflects clear statements of legislative intent to *preserve* state law tort claims. *Cipollone, supra*, 593 F. Supp. at 1161-63 (142a to 146a).

This Court denied certiorari on the Third Circuit's interlocutory preemption decision. 479 U.S. 1043 (1987) (94a). Although that certiorari petition raised the same issues presented in this petition, the procedural posture on this appeal is much different. First, a direct conflict now exists between the Third Circuit and the New Jersey Supreme Court. Second, the Third Circuit's ruling on preemption also conflicts with a recent

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6. This Court has held that federal law may preempt state law in three ways: (1) when Congress expressly preempts state power; (2) when the pervasive federal scheme indicates that Congress impliedly intended to occupy the field exclusively; or (3) when an actual conflict exists between the federal regulation and the state regulatory activity. *See English v. General Electric Co.*, ___ U.S. ___, 110 S. Ct. 2270, 2275 (1990).

preemption opinion issued by the Supreme Court of Minnesota regarding state intentional tort claims.

On remand, the District Court interpreted the Third Circuit's interlocutory preemption decision as barring all of petitioner's post-1965 (post-Cigarette Act) claims for: failure to warn, fraudulent misrepresentation, express warranty, and conspiracy to defraud. 649 F. Supp. at 664 (D.N.J. 1986).

At the conclusion of a four (4) month trial, the jury awarded $400,000 to Mr. Cipollone against Liggett on his pre-1966 breach of warranty claim, based on Liggett's false advertising before the enactment of the Cigarette Act. It also concluded that Liggett had a duty to warn its consumers of the health hazards of smoking pre-1966 but failed to do so.[7]

Post-trial appeals were filed by both petitioner and respondents. In a thirty-two page opinion, the Third Circuit considered eleven separate, complicated issues raised by the *Cipollone* trial.[8] Most significant for this writ, the appeals panel reaffirmed the earlier Third Circuit interlocutory preemption decision, citing the Circuit's internal operating procedures that require adherence to Third Circuit precedent and prohibit one panel from overruling a prior panel. 893 F.2d at 581, n. 51 (88a). The court also affirmed the application of preemption to post-1965 intentional torts since such claims would "challenge . . . the propriety of defendants' actions with respect to the advertising and promotion of cigarettes." 893 F.2d at 582 (quoting

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7. No award was made on this claim because of the jury's allocation of comparative fault. This issue, however, has been remanded for a new trial as the Third Circuit concluded that the trial court's charge on the comparative fault issue was erroneous. 893 F.2d at 570-574 (62a-71a).

8. The Circuit Court provided a table of contents which appears at 893 F.2d at 545.

interlocutory preemption decision, 789 F.2d at 187) (90a). Thus, without expressing enthusiasm or support for the preemption ruling, the panel reaffirmed the holding of the prior panel's interlocutory preemption decision.

Chief Judge Gibbons joined the preemption portion of the opinion only because he felt bound by the prior panel's interlocutory preemption decision. He wrote a separate concurring opinion, however, in which he cited the preemption opinions of this Court and expressed his belief that the Third Circuit's preemption decision was "wrong as a matter of law." 893 F.2d at 583 (92a).

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT'S DECISION IN *CIPOLLONE* ON THE FEDERAL QUESTION OF PREEMPTION IRRECONCILABLY CONFLICTS WITH OPINIONS OF TWO STATE COURTS OF LAST RESORT AND, HENCE, DESERVES THIS COURT'S ATTENTION PURSUANT TO U.S. SUP. CT. R. 10(a).

A. The Third Circuit decision directly conflicts with the decision of New Jersey's court of last resort in *Dewey* on the same issue.

The highest court of the State of New Jersey (which falls in the Third Circuit) has issued a decision directly in conflict with the Third Circuit's preemption opinion in *Cipollone*. Both cases address the preemptive scope of the Federal Cigarette Labeling Act. Both involve post-Act failure to warn claims against cigarette manufacturers. Both arise in almost the identical factual and legal context. This split of authority on this important federal question has severe practical consequences. If a plaintiff brings a state law based product liability action against a cigarette manufacturer in federal court in New Jersey, all post-1965 claims premised on the inadequacy of the warnings, the manufacturers' advertising practices or intentional wrongdoing are barred. If the same plaintiff were to bring an identical lawsuit in state court in New Jersey, *none* of these claims would be barred.

The very existence of this split in authority cries out for intervention by the Supreme Court. This case falls squarely within Supreme Court Rule 10(a) because the Third Circuit "has decided a Federal question in a way in conflict with a state court of last resort."

Cipollone was the first federal appellate case to interpret the preemptive scope of the Cigarette Act. It held that state law damage actions that challenge (1) "the adequacy of the warning on cigarette packages" or (2) "the propriety of a party's actions with respect to the advertising and promotion of cigarettes" are preempted under the "actual conflict" prong of preemption. 789 F.2d at 187 (106a).[9]

In reaching its decision on preemption, the Third Circuit described the Cigarette Act as a "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the national economy." *Id.* The court held that damages actions based on inadequate warnings and deceptive advertisements would "upset" this balance, because jury verdicts in such cases would effectively regulate the congressionally-mandated warnings. Manufacturers would be forced to change the warnings on the cigarette packages in response to damage awards.[10] Hence state-based product liability claims would impermissibly conflict with the purposes of the Act.

The Third Circuit's opinion in *Cipollone* has dominated this issue of national importance. Four federal courts of appeals have followed its preemption

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9. The Third Circuit concluded that although the Act neither expressly nor impliedly preempts such claims, such suits nevertheless are preempted under the "actual conflict prong" of the preemption doctrine. *See supra*, note 6.

10. As the First Circuit explained in *Palmer v. Liggett Group Inc.*, 825 F.2d 620, 627-28 (1st Cir. 1987), a case that followed *Cipollone:*

> Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability.

holding.[11] However, this erroneous application of the preemption doctrine was dramatically challenged by the New Jersey Supreme Court decision in *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69 (1990) (181a). *Dewey* parted company with *Cipollone* and its progeny on the question of "actual conflict." 121 N.J. at 86 (198a).[12] After analyzing this Court's actual conflict preemption jurisprudence carefully, *Dewey* concluded that state common law tort remedies do not conflict with the goal of the Cigarette Act to protect consumers.

First, *Dewey* noted this Court's high standard for finding actual conflict. The New Jersey Supreme Court concluded that the threshold had not been met and "refused to accept" the Third Circuit's "assumption" of actual conflict "as the foundation for an 'unambiguous Congressional mandate.' " 121 N.J. at 90 (202a).

Second, *Dewey* rejected the notion advanced by the cigarette manufacturers and adopted by the appellate court in *Cipollone* that state tort actions would have the effect of regulating industry behavior and therefore would necessarily conflict with the Act. Relying heavily on this Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), it held that such incidental regulatory effect does not automatically rise to the level of "actual conflict." According to *Dewey*, *Silkwood* "suggests that Congress may be willing to tolerate regulatory consequences of the application of state tort law even where direct state regulation is preempted."

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11. *See Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987).

12. It agreed that the Cigarette Act does not meet the first two prongs of preemption — the Act does not expressly preempt common law remedies nor does it impliedly preempt those remedies by occupying the field. 121 N.J. at 86 (198a).

121 N.J. at 89 (201a).[13]

Third, *Dewey* was mindful of the need for uniformity as set out in the statement of policy and purpose in the Cigarette Act, and recognized that state damage actions may indirectly encourage cigarette manufacturers to amend the warnings on their product. The *Dewey* court noted, however, that state damage actions need not undermine the uniformity of the Act. Cigarette manufacturers could respond to tort suits without altering the congressionally-mandated warnings. For instance, manufacturers could pay damage awards, include a package insert, or voluntarily supplement the warnings on the package — all of which would comport with the strictures of the Cigarette Act. *Id.*[14] The New Jersey Supreme Court concluded that the *Cipollone* preemption decision rested on dubious inferences and assertions." 121 N.J. at 86 (197a-198a).

B. The Third Circuit's decision also conflicts in part with the preemption opinion of Minnesota's court of last resort on the intentional tort issue.

A more narrow, but no less important conflict exists between *Cipollone* and the Minnesota Supreme Court. In *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W. 2d 655, 659-62 (Minn. 1989)

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13. The *Dewey* court also relied upon *English v. General Electric Co.*, ___ U.S. ___, 110 S. Ct. 2270 (1990) (nuclear plant liable for intentional infliction of emotional distress of worker fired for whistle-blowing even though the federal regulations provide specific remedies for whistle-blowers under the Energy Reorganization Act) and *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988) ("Congress may reasonably determine that incidental regulatory pressure is acceptable whereas direct regulatory pressure is not.").

14. *But, cf., Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627 (1st Cir. 1987) (following *Cipollone* and rejecting "disingenuous" argument that monetary damages would not compel a change of the warning).

(174a, 177-78a), the Minnesota Supreme Court held that state tort claims based on a state-imposed duty to warn are preempted by the Cigarette Act because such remedies constitute a regulatory scheme. The court disagreed, however, with the Third Circuit's ruling insofar as it applied preemption to post-1965 (post-Act) intentional tort claims. In holding that state damage actions for intentional misrepresentation were not preempted, the Minnesota court reasoned that preempting state action for false misrepresentation would actually subvert the policy of the Cigarette Act. It would allow cigarette manufacturers to actively and intentionally mislead consumers. *Forster* distinguished intentional misrepresentation from mere failure to warn because misrepresentation nullifies the value of the congressionally-mandated warnings. *Id.*

The Minnesota Supreme Court's holding in *Forster* directly conflicts with the decision of the Third Circuit in *Cipollone* that held such claims "unequivocally" preempted because they challenge the "propriety" of the cigarette manufacturers' actions in promoting and advertising cigarettes. 789 F.2d at 187 (106a); 893 F.2d at 582 (90a).

The practical impact of the Third Circuit's decision was best described by the trial court in *Cipollone* in its opinion on remand:

> No matter how false or misleading cigarette advertising may be or have been, and even if intentionally so, no state law cause of action may arise on behalf of anyone who may have relied thereon to their detriment or death. Indeed, the tobacco industry evidently can continue to deny or refute the risks of cigarette smoking with impunity and immunity so long as the little rectangle with the necessary language appears in its advertising and on its cigarette packages.

649 F. Supp. 664, 667 (D.N.J. 1986).

This exemplifies the tenuous extreme to which the Third Circuit extended this Court's preemption doctrine. The doctrine now stands not as a protective device for Congress' enumerated powers but as a tool for striking down areas of legitimate state concern.

II.

THE THIRD CIRCUIT'S OPINION IGNORES THE PREEMPTION DECISIONS OF THIS COURT, AND UNDERMINES THE PRINCIPLES OF FEDERALISM INHERENT IN THE PREEMPTION DOCTRINE.

A. The Third Circuit's opinion conflicts with *Silkwood* and other recent Supreme Court preemption decisions.

In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984), this Court held that the Atomic Energy Act did not preempt a state tort action seeking punitive damages for a worker injured at a federally regulated and licensed nuclear plant despite federal law placing "exclusive regulatory authority" over nuclear safety in the United States government.

This Court recognized and addressed the potential for state tort actions to affect the conduct of the nuclear industry. It acknowledged that "an award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability." *Id.* at 256. Nevertheless, preemption was rejected. *See id.*

Silkwood relied on Congress' failure to explicitly preempt tort actions and held that such silence "takes on added significance in light of [its] failure to provide any federal remedy for persons

injured by such conduct." *Id.* at 251. The Court found it incredible that Congress would, *sub silentio,* remove all means of judicial recourse. *Id.* Contrary to this philosophy, the *Cipollone* court completely ignored the fact that the Cigarette Act provides neither a remedy for injured smokers nor an explicit statement evidencing intent to remove all means of judicial recourse.

More recently, in *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174 (1988), this Court concluded, despite the fact that the Supremacy Act shielded federally-owned nuclear facilities from "*direct* state regulation," that enforcement of a workers' compensation award for violating safety requirements under state law standards was not preempted because such awards exerted only an "incidental regulatory effect." 486 U.S. at 1712. Furthermore, like *Dewey,* this Court noted that appellant had the option to "disregard Ohio safety regulations and simply pay an additional workers' compensation award . . . ." *Id.*

Goodyear suggests that courts should examine the options available to the regulated entity before jumping to the conclusion that state damage suits actually conflict with a statute.[15] As in *Goodyear,* the respondents in *Cipollone* retain the option of paying for the damage they cause without altering their regulated behavior. Therefore, as in *Goodyear*, the state tort actions should not be preempted.

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15. *See also, English v. General Electric Co.,* ___ U.S. ___, 110 S. Ct. 2270 (1990) (nuclear power plant employee maintained common law claim for intentional emotional distress based on employer's alleged whistle-blowing despite tangential interference with Energy Reorganization Act); *International Paper v. Ouellette,* 479 U.S. 481 (1987) (Clean Water Act does not preempt New York nuisance action because such preemption would leave plaintiffs without a remedy); *Oneida County, N.Y. v. Oneida Indian Nation of New York State,* 470 U.S. 226 (1985) (rejecting preemption because the federal act contained no remedial provision that would replace state common law remedy).

Mysteriously, aside from citing *Silkwood* for some black letter preemption law, the Third Circuit ignored this seminal case entirely. Instead, the Third Circuit cited older and distinguishable authority to conclude that the regulatory effect of state law damage claims necessarily must conflict with congressional objectives. 789 F.2d at 187 (105a).[16]

Finally, *Cipollone* provides an even more compelling basis for rejecting preemption than does *Silkwood.* The primary purpose of the Atomic Energy Act in *Silkwood* is to promote the nuclear power industry while at the same time protecting the public. In contrast, the *primary* goal of the Cigarette Act is to inform the public of the health hazards associated with smoking, which perforce undercuts the marketability of the product. The Cigarette Act specifically subordinates the policy of fostering the cigarette trade to the loftier goal of protecting public health and safety. *Compare,* 15 U.S.C. § 1331(1) and (2).

B. The Third Circuit opinion in *Cipollone* misapplied the "actual conflict" prong of preemption, disregarded the state's strong interest in providing traditional tort remedies and continues to generate confusion in product liability matters far removed from tobacco litigation.

The Third Circuit paid lip service to the narrow scope of

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16. The Third Circuit quoted *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), as authority for the proposition that state damage actions should be preempted. *Garmon* explained that

> regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

Id. at 246-47. The Labor Act in *Garmon* involved a pervasive scheme for compensation that would have been frustrated entirely by separate state suits (Cont'd)

preemption and the sanctity of traditional state rights and remedies.[17] However, in substance, the Third Circuit failed to heed this Court's admonition "not [to] decree such a federal displacement 'unless it was the clear and manifest purpose of Congress.' " *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

Most significant, the Third Circuit misapplied this Court's teachings on the "actual conflict" prong of implied preemption. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 204 (1983) (state law is preempted "to the extent it actually conflicts with federal law."). This Court has emphasized that to justify preemption, the conflict must be unavoidable and that "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Further, evidence of actual conflict cannot be merely "hypothetical" or "potential." *See Rice v. Norman Williams Co.*, 458 U.S. 654 (1982).

(Cont'd)
for compensation. *Garmon* is distinguishable from the Cigarette Act, which includes *no* compensation scheme. Furthermore, the language of *Garmon* does not fully apply to this case because there is no presumption in favor of federal preemption, as there is in cases involving the NLRB.

17. The court stated that it was "constrained by the presumption against preemption." 789 F.2d at 185 (102a). It also observed that

> the Cipollones' tort action concerns rights and remedies traditionally defined solely by state law. We therefore must adopt a restrained view in evaluating whether Congress intended to supersede entirely private rights of action such as those at issue here.

789 F.2d at 186 (140a).

The Third Circuit's finding that "state common law damage actions have the effect of requirements that *are capable* of creating" an actual conflict, 789 F.2d at 187 (105a) (emphasis supplied), relies on potential, not actual conflict or frustration of purpose. The mere "capability of conflict" simply does not satisfy the high threshold this Court has set out for preemption.

The Third Circuit opinion in *Cipollone* dangerously disrupts the delicate balance between the states' interest in protecting their citizens through traditional tort remedies and the federal government's interest in uniform and unfettered regulatory control. The Third Circuit failed to recognize that state-damage claims advance an essential independent goal apart from their incidental regulatory effect: compensating injured citizens. It overstates the federal interest in preempting state law, devalues the state's interest in their citizens' health and safety, and leaves injured citizens without a remedy.[18]

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18. As noted by the 1986 Report of the Working Group on Federalism,

> There is . . . no question that Congress can, by explicit legislation, displace state regulation in any field whose boundaries lie entirely within the reach of one of Congress' enumerated powers. But it is quite a different matter for a court to declare an entire field of state law preempted in the absence of an express statement to that effect . . . [A] decision improperly limiting state decisionmaking authority obviously represents a direct and illegitimate alteration in the federal-state relationship established by the Constitution . . . [A]ny judicial decision that departs from the original meaning of the Constitution does serious damage to the structure of constitutional federalism . . .

Working Group on Federalism, Domestic Policy Council, The Status of Federalism in America: A Report of the Working Group on Federalism of the Domestic Policy Council at 40-41, 43 (November 1986) (emphasis in original).

The Third Circuit preemption opinion in *Cipollone* and its progeny have fostered dispute and confusion in areas outside of tobacco litigation, where those opinions have provided the basis for the dubious argument that preemption applies whenever a company has complied with a federally imposed warning requirement.

Heretofore, courts have generally agreed that mere compliance with federally mandated labeling requirements does not immunize manufacturers from suits based on their failure to warn of inherent dangers in their products.[19] The Third Circuit opinion, however, seems to challenge that consensus and has already begun to confuse other courts. This confusion is understandable because logically, the Third Circuit's analysis in *Cipollone* could preempt state court product liability suits for *all* products that carry federal warning labels. Clearly, the Third Circuit in *Cipollone* misunderstood the congressional policies expressed in the Cigarette Act. This Court must therefore address the preemption issue in a product liability context.

In *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1982), *cert. denied*, 469 U.S. 1062 (1984), the Court of Appeals for the District of Columbia, relying in large part on this Court's holding in *Silkwood*, held that chemical manufacturers' compliance with the labeling requirements of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") does not preempt state tort actions based on the inadequacy of

19. *See, e.g., MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 475 N.E. 2d 65 (1985); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 461 (1984). (No preemption of product liability suits against drug manufacturers for failure to warn of risks, even though the FDA prescribes specific, national uniform warnings.) *Cipollone* renewed efforts to raise preemption in pharmaceutical cases. *See, e.g., Spychala v. G.D. Searle & Co.*, 705 F. Supp. 1024, 1031 (D.N.J. 1988); *Hurley v. Lederle Laboratories, Div. of American Cyanamid Co.*, 651 F. Supp. 993, 998, n.5 (E.D. Tex. 1986), *rev'd*, 863 F.2d 1173 (5th Cir. 1988).

an EPA-approved label. The court reasoned that a state jury verdict does not automatically "require" a manufacturer to change its labels, but rather, leaves the manufacturer the choice of petitioning for a more comprehensive label or paying damages. *Id.* at 1542.

Recently, however, several lower courts, in deciding the preemptive effect of FIFRA, have rejected *Ferebee* in favor of the reasoning of *Cipollone* and *Palmer*. Like the cigarette cases, the focus of the dispute involves the application of the "actual conflict" prong of the preemption analysis.[20]

In the pharmaceutical field, the courts also disagree about the application of the actual conflict test as set forth in this Court's analysis in *Silkwood*. Numerous decisions hold that FDA regulations set minimum warning standards but do not conflict with state common law which may, by virtue of a jury verdict, establish liability for failure to comply with a different warning standard.[21]

20. *See Fitzgerald v. Mallinckrodt Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987); *Kennan v. Dow Chemical Co.*, 717 F. Supp. 799, 805-06 (M.D. Fla. 1989); *Fisher v. Chevron Chemical Co.*, 716 F. Supp. 1283, 1287-88 (W.D. Mo. 1989). Other lower courts reject the applicability and/or reasoning of *Cipollone* and its progeny and continue to hold that FIFRA has no preemptive effect for such claims. In doing so, however, these courts perform semantic handsprings to distinguish *Cipollone* and *Palmer*, in order to follow the diametrically opposed reasoning of *Ferebee*. *See Cox v. Velsicol Chemical Corp.*, 704 F. Supp. 85, 87 (E.D. Pa. 1989); *Roberts v. Dow Chemical Co.*, 702 F. Supp. 195, 197-99 (N.D. Ill. 1988).

21. *See, e.g., Allen v. G.D. Searle & Co.*, 708 F. Supp. 1142 (D. Or. 1989); *Kociemba v. G.D. Searle & Co.*, 680 F. Supp. 1293, 1299 (D. Minn. 1988); *Graham by Graham v. Wyeth Labs, a Div. of American Home Products Corp.*, 666 F. Supp. 1483 (D. Kan. 1987).

Other courts have found in favor of preemption on the grounds that imposition of damages under state tort law would be equivalent to state-imposed warning requirements and hence would conflict with FDA warning regulations.[22]

In sum, *Cipollone's* expansive view of preemption "has the burning force of a prairie fire, and it is hard to see what structures of state compensation would survive the ensuing conflagration." L. Tribe, "Anti-Cigarette Suits: Federalism with Smoke and Mirrors," *The Nation* 788 (June 7, 1986). The Third Circuit distorted and misstated preemption law, demeaning and endangering the principles of federalism that underlie it. The confusion created by these decisions cries out for clarification by this Court.

III.

AS THE MINNESOTA SUPREME COURT HELD IN DISAGREEING WITH *CIPOLLONE*, EVEN ASSUMING THAT THE CIGARETTE ACT PREEMPTS CLAIMS RELATED TO MANUFACTURER WARNINGS, IT DOES NOT PRECLUDE PETITIONER'S INTENTIONAL TORT CLAIMS.

The Supreme Court of Minnesota recognized the crucial distinction for preemption analysis between intentional torts and other claims based on manufacturers' warnings. In *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 662 (Minn. 1989) (177a),

22. *See Lindquist v. Tambrands, Inc.*, 721 F. Supp. 1058, 1062 (D. Minn. 1989); *Rinehart v. International Playtex, Inc.*, 688 F. Supp. 475, 477 (S.D. Ind. 1988); *Stewart v. International Playtex, Inc.*, 672 F. Supp. 907, 910 (D.S.C. 1987); *Berger v. Personal Products, Inc.*, 115 Wash. 2d 267, 797 P.2d 1148 (1990). *Cf. Moore v. Kimberley-Clark Corp.*, 867 F.2d 243 (5th Cir. 1989); *Lavetter v. International Playtex Inc.*, 706 F. Supp. 722 (D. Ariz. 1988).

the Minnesota Supreme Court found that the Cigarette Act preempts state damage actions based on the federally mandated warnings. However, the court specifically distinguished intentional torts and held that the Cigarette Act does not preempt a claim for intentional misrepresentation. The court explained that an action for common law misrepresentation "is based on a duty to tell the truth, not on a duty to warn" *Id.* The Supreme Court of Minnesota noted that such a cause of action challenges not the adequacy of warning, but "what the cigarette manufacturer has chosen to say." It observed further that to find that the Cigarette Act preempted damage actions for intentional misrepresentation

> we would have to assume that Congress intended the Act to be a license to lie, an assumption both uncharitable to Congress and violative of this state's deep concern for honesty as well as health.

Id. at 662 (178a).

The Third Circuit erred in holding that the Cigarette Act preempts intentional tort claims.[23] Even if the preemptive scope of the Cigarette Act did extend to actions based on manufacturers' warnings, it could not conceivably extend to intentional misrepresentation by the cigarette manufacturers. There is an obvious logical distinction between failure to warn, which derives from breach of an existing duty, and intentional misrepresentation,

23. Petitioner argued that even if the Cigarette Act preempted post-1965 claims based on the warnings, it did not preclude post-1965 counts for intentional misrepresentation. The Third Circuit, however, affirmed the District Court's application of preemption to intentional torts. It held that petitioner's intentional tort claims fell within the interlocutory preemption holding because they "challenge . . . the propriety of defendant's actions with respect to the advertising and promotion of cigarettes." 893 F.2d at 582 (quoting interlocutory preemption decision. 789 F.2d at 187) (90a).

which emanates from respondents' affirmative and gratuitous undertaking to misrepresent facts to the public.

The arguments favoring preemption, discussed by *Cipollone* and its progeny, simply do not apply to intentional torts. Liability imposed for intentional torts would not impose additional warning requirements on respondents; it would not affect the content or uniformity of the warnings. Therefore, such actions do not trigger an "actual conflict" and certainly do not "frustrate the purpose" of the Act.

Instead, liability for intentional misrepresentation would have the salutary effect of inhibiting cigarette manufacturers from lying about their products. It would deter respondents from undertaking affirmative public relations efforts to mislead current smokers and attract new addicts. If the Cigarette Act warnings indeed represent the proper balance between human health and the health of the cigarette industry, then that compromise can only be realized if the consumers find the warnings credible. Therefore, rather than frustrate the purpose of the Act, such liability would *promote* the compromise inherent in the Cigarette Act by preventing the manufacturers from undermining or nullifying the required warnings.

CONCLUSION

Wherefore, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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